IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D.,
Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION OF LAWYERS FOR LIFE, INC., AND SOCIAL WORKERS FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES AND BRIEF

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T. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal," 2 Loyola U.S. Rev. (L.A.) 1 (1969) 9

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O. English & C. Foster, Fathers Are Parents, Too (1951) 16
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Family Therapy and Disturbed Families (G. Zuk & I. Boszormenyi ed. 1967) 10

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K. Geiger & A. Inkeles, "The Family in the U.S.S.R.," 16 Marriage and Family Living 397 (1954) 11

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Note, "Abortion: The Father's Rights," 42 U. Cin. L. Rev. 441 (1973) 12

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V. Satis, Conjoint Family Therapy (1967) 10

G. Schaefer, "The Expectant Father: His Care and Management," 38 Postgraduate Medicine 658 (1965) 16

R. Schlesinger, Changing Attitudes in Soviet Russia: The Family in the U.S.S.R. (1949) 11

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B. Steele, "Parental Abuse of Infants and Small Children," Parenthood: Its Psychology and Psychopathology, 20 9-244 (E. Anthony & T. Benedek eds. 1970) 17

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MOTION OF LAWYERS FOR LIFE, INC. and SOCIAL WORKERS FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES

Lawyers for Life, Inc., a Not-for-Profit Corporation, and Social Workers for Life, respectfully move for leave to file a Brief as Amici Curiae in support of Appellees.

Lawyers for Life, Inc. is a Not-for-Profit Corporation, incorporated under the laws of the State of Missouri for the express purpose through its Charter as follows: "To secure through law the natural right to life for all innocent life from conception to natural death. In seeking to accomplish this end, the organization elects to engage in legal actions, public activities, education, research, and dissemination of information and furtherance of the aforesaid objects and lend its assistance to all persons, organizations, or causes which promote or further such end." Its members consist of lawyers engaged in the general practice of law, trial practice, patent law, professors at St. Louis University School of Law, Washington University School of Law, all located principally in the Metropolitan St. Louis area.

Social Workers for Life is an organization of social workers, most of whom are members of the Academy of Certified Social Workers who have the following expressed purposes:

1) To promote social policies and legislation at the local, state, and federal levels that will protect the rights of all persons from the moment of conception until natural death;

2) To foster programs that promote the maximum development of the individual throughout his/her lifetime;

3) To protect human life from legal or illegal discrimination;

4) To provide a form in which some of the complex issues that affect the dignity of persons can be discussed and clarified;

5) To assist social workers to resolve issues in which their personal and professional values are in conflict with agency policy and/or professional groups;

6) To provide a vehicle through which individual social workers may demonstrate their concern through meaningful volunteer and educational programs;

7) To work in cooperation with other pro-life groups to achieve common goals.

Both organizations are vitally interested in the legal, moral, ethical and social problems involving protection of the unborn from the first moment of biological development.

The attorney members of Lawyers for Life have a special interest in the litigation now before this Court because of the serious questions raised by the instant case with respect to the legal status of the family in American society and the legal rights of parents and husbands. As members of American society and American families, as well as members of the legal profession charged with the responsibility of protecting the rights of individuals and society, we are concerned that the challenge presented by this case to the stability of the American family raises questions of profound and disturbing nature. In our brief, we direct ourselves solely to those sections of the Missouri statute in question that pertain to the rights of parents of minor children and husband to participate in deliberations and decisions regarding the termination of life through abortion. Because of the number of sections of the statute in dispute and the complexity of the issues involved, there is the very real possibility that the rights of absent—parents and husbands—may be overlooked. For this reason, we ask leave of this Court to present our views regarding the underlying principles upon which the validity of those portions of the challenged statute pertaining to consent should be determined.

The consent of John C. Danforth, Attorney General of the State of Missouri and Counsel for Appellees, has been obtained

and has been filed with this Court. Frank Susman, Attorney for Appellant, would not consent to this Brief.

Respectfully submitted

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BRIEF AMICI CURIAE OF LAWYERS FOR LIFE, INC. and SOCIAL WORKERS FOR LIFE IN SUPPORT OF APPELLEES

STATEMENT OF THE CASE

On June 17, 1974, Appellant filed in the District Court seeking a declaratory judgment holding the Missouri abortion statute (House Committee Substitute for House Bill 1211, 77th General

Assembly, Second Regular Session) to be unconstitutional and requesting the Court to issue a permanent injunction restraining the defendants from implementing or enforcing the new statute.

Declaratory relief was requested pursuant to 28 U.S.C., Section 2201, and a statutory three-judge panel was convened on June 19, 1974, pursuant to 28 U.S.C., Sections 2281 and 2284.

Appellant's application for a temporary restraining order and a preliminary injunction were denied and trial on the merits took place on July 22 and 23, 1974. The District Court entered an opinion and order upholding all challenged sections of the statute, with the sole exception of Section 6(1) which was held to be unconstitutional and its enforcement accordingly enjoined.

The District Court, in its opinion, held that the challenged provisions of House Bill 1211 (Sections 2(2), 3(2), 3(3), 3(4), 6(1), 7, 9, 10(1), 10(2), 10(3), and 11) "with the exception of Section 6(1), . . . conform to the *Roe* and *Doe* decisions in every material respect." 392 F. Supp. 1362, 1367.

Appellee Danforth filed his "Motion to Alter or Amend Judgment" in regard to Section 6(1) on February 6, 1974, and the same was denied by "Order" of the District Court on February 12, 1975.

Appellants' "Motion for Stay of Application and Enforcement of Statute Pending Appeal to the United States Supreme Court" was granted by this Honorable Court on February 18, 1975 (43 L.W. 3451). Appellants' appeal to this Honorable Court was taken pursuant to 28 U.S.C., Section 1253.

ARGUMENT

I

The State and the Family Interests in Protection of the Health & Welfare of the Family Override a Minor's Free Access to Abortion.

Roe v. Wade specifically declined to consider parental consent as a requirement for a minor seeking an abortion. 410 U.S. 113, 165 n 67 (1973). Therefore, the application to minors of the *Roe* standards of personal privacy and compelling state interests has been conjectural. Upon examination now it is imperative that the relationship between the minor and her parents, the minor and the state, and the family and the state be weighted against the minor's right to an abortion.

Traditionally, the state has sought to protect minors. Often, the state has made it clear that the minor is not equal to an adult. This is true in areas like contracting, operation of a motor vehicle and access to alcoholic beverages. In other situations, the state requires protection of the minor by appointment of a guardian ad litem. It is always the quality of a minor's decision-making which is in issue: the state would protect the minor from his own improvidence and lack of information.

In more personal matters, the state assigns protection of the minor to his parents. At common law parental consent for medical treatment is required as a substitute for the child's. Restatement of Contracts § 18 (Tentative Draft, 1964). Although there are some kinds of treatment which state statutes permit without parental consent, such as treatment for venereal disease, the minor is still rigidly restricted. In *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), the Court invalidated a federal program provision which gave minors the authority to consent to sterilization. Parental guidance in decisions with lifelong

physical, mental and psychological effects would seem mandatory.

The legal rights of the minor have been delineated both in criminal and civil areas. *Doe v. Planned Parenthood*, 29 Utah 356, 410 P. 2d 75 (1973) *appeal dismissed* and *cert. denied*, 14 U.S. 805 (1973) approved the requirement of parental consent for the use of contraceptives by a minor. *Ginsberg v. New York*, 390 U.S. 629 (1968), upheld a New York statute which prohibited the sale of obscene literature to minors. The courts have consistently protected the minor's right to freedom of expression, *Tinker v. Des Moines*, 393 U.S. 503 (1969), and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), but in the area of privacy, a definition of the scope of the minor's rights is lacking. One case, *Merriken v. Cressman*, 364 F. Supp. 913, 918-19 (1973), stated that the state's use of questionnaires designed to pinpoint drug users was an invasion of the students' privacy.

The Supreme Court has recognized the importance of the family to society. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Mayer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Roe* reiterated the fundamental concept of child rearing and education as a right of the parents. *Roe*, 410 U.S. at 134. As a basic societal unit, the parents have the responsibility for nurturing and guiding the children of the family. Traditionally, the state's interference in child raising has been slight, as in requiring some type of education or requiring certain inoculations. When the state did step in, as in child neglect or juvenile delinquency situations, it was because the parents were unwilling or unable to cope with the child. Justice Clark has written that

> Unless the State has a compelling interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day to day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.

T. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal", 2 *Loyola U.L. Rev.* (*L.A.*) 1, 8 (1969).

The parents' interest in helping their child to formulate a good decision cannot be doubted. In an abortion decision, matters of physical health, mental well being and future psychological damage must be evaluated by the decision makers. *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), held that a woman, married or of legal age, would make the abortion decision in consultation with her doctor. Testimony cited in Defendant Danforth's Post-trial Brief, pages 10-11, shows that the decision is not made by the patient and doctor in most clinic situations. No less an advocate of legalized abortion than Bernard N. Nathanson, M.D., one of the founders of the Center for Reproduction and Sexual Health, the self-styled first and largest abortion clinic in the Western world, recently expressed concern about the caliber of counseling given to women contemplating abortions. In his words the typical counseling available is "the narrow partianship of committed young women who have had abortions." 291 *New England Journal of Medicine* 1189, 1190 (1974). Such counseling cannot be unbiased.

* * * * * * *

If the minor is allowed to decide for herself, or with the aid of counselors employed by these abortion clinics, the minor takes major physical and emotional risks without any kind of state or parental protection. By not allowing parents to have some voice in this decision process, the court violates the rights of parents. Their duty to support and raise their child remains, but their authority is unjustifiably narrowed when they have no voice in the decision. Parental rights must be protected if parents are to fulfill their legal obligation to the child.

Many recent dissents have supported an idea first promulgated in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944), that parental function and freedom in raising their children included "preparation for obligations the state can neither supply nor hinder." *State v. Koome*, 530 P. 2d 260, 271 (Wash. 1975); *Planned Parenthood Assn. v. Fitzpatrick*, No. 74-2440 (Sept. 4, 1975); *Baird v. Bellotti*, 393 F. Supp. 847, 857 (D. Utah, 1975).

The health of the minor is the major consideration of her parents. She may be completely unaware of the physical or emotional problems which could result, whether she decides to have or not to have an abortion. Besides the factual information which the parent can either supply or seek, it is the parents who will be giving emotional and financial support to the minor.

Many eminent social scientists, psychologists, socialogists, psychiatrists and social workers recognize the futility of treating just the individual who is facing a crisis without also involving her family in the treatment process. The family is viewed as a unit of interacting personalities where individual problems are seen as reflecting family problems and wherein the family unit has a vital stake in the member's attempt to cope with a personal crisis. This is particularly the case with minor children since they are even more apt to be psychologically and physically dependent upon the family for security and counsel. S. Minuchin, *Families & Family Therapy* (1974); *Expanding Theory and Practice in Family Therapy* (N. Ackerman ed. 1967); *Family Therapy and Disturbed Families*, (G. Zuk & I. Boszormenyi ed. 1967); V. Satis, *Conjoint Family Therapy* (1967); R. Brown, "Feedback in Family Interviewing," 18 *Social Work* 52-59 (Sept. 1973); D. Olson, "Marital and Family Therapy: Integrative Review and Critique," *Journal of Marriage and the Family*, No. 1970, 501-537; "Psychiatric Aspects of Abortion," 64 *J.N.M.A.* 308 (1972).

The state actually protects itself in preserving the family unit. Marriage and sexual regulations have been a feature of

state law for many years. The effect on the state of permissive abortion has been damaging in the past. For example, in the early 1920s abortion on demand was explicitly permitted in Soviet Russia for minors as well as adults. Widespread abortion and other anti-family policies precipitated a severe breakdown in the parent-child relationship. Delinquency, irresponsibility and human exploitation were rampant. The Soviet government abolished free abortion on June 27, 1936, because the entire structure of Soviet society was so threatened. The importance of the family structure where parents had authority over their minor children once again became the established Soviety policy. N. Timasheff, "The Attempt to Abolish the Family in Russia," *A Modern Introduction to the Family*, 55, (N. Bell & E. Vogel eds. 1960); L. Coser, "Some Aspects of Soviet Family Policy," 56 *American Journal of Sociology* 424 (1951); R. Schlesinger, *Changing Attitudes in Soviet Russia: The Family in the U.S.S.R.* (1949); K. Geiger & A. Inkeles, "The Family in the U.S.S.R.," 16 *Marriage and Family Living* 397 (1954).

It is vital that § 3(4) of Missouri House Bill 1211 be upheld by the Court. By eliminating the prior abortion laws, the Supreme Court made abortion available to all women. If minor women are allowed the same unrestricted access to abortion, the court will be sanctioning a tremendous upheaval in American families. The Missouri legislature has acted to maintain the traditional family relationship, a unit basic to the state's own well-being, by requiring the consent of at least one parent for an abortion to a minor.

Critics of the parental consent provision cite unreasonable manipulation of a minor by parents who would force her to have an abortion that she didn't want, or preventing her from having an abortion that she did want. This focuses on families where the parents are assumed to be unconcerned about the health and safety of their daughters. House Bill 1211 requires the consent of only one parent, and it would seem

reasonable to assume that the legislators were drafting a bill which would protect the welfare of individual girls and family units. To find the section unconstitutional because of possible abuse would be unthinkable. Every law has the potential of supporting an abusive use of the law. The state's interest in preserving the family, and the parents' interest in the health and welfare of their daughters overcome a minor's free access to abortion.

II

The Husband Has an Interest in the Unborn Child Which His Spouse Is Carrying.

It cannot be denied that a husband has an interest in the unborn child which his spouse is carrying. This position was recognized by the Supreme Court when it declared that "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535 at 541 (1942). It is well established that parenthood or the desire to be a parent is of fundamental importance to the marriage partners. L. Jessner, E. Weigert & J. Foy, "The Development of Parental Attitudes During Pregnancy," in *Parenthood: Its Psychology and Psychopathology* (hereafter, *Parenthood*), 20 9-244 (E. Anthony & T. Benedek eds. 1970).

Authority for the position that husbands have an equal interest in their unborn child which they share with their wives is found in *Touriel v. Benveniste*, Docket No. 776790 (Col. Sup. Ct., Oct. 20, 1961), an unpublished opinion cited in Note, "Abortion: The Father's Rights," 42 U. Cin. L. Rev. 441, 445 (1973). The Court held that a husband could sue and collect damages from a doctor who aborted the unborn child his wife was carrying where the doctor did not have the husband's consent. There are also many wrongful death cases in which both fathers and mothers are alleged to recover for

the wrongful death of their unborn child. See 18, *The Ass'n of Trial Lawyers of America Newsletter* 6 at 284 (August, 1975). In the recent case of *Coe v. Gernstein*, 376 F. Supp. 695, 698 (S.D. Fla. 1973), the Court declared that: "The interest which a husband has in seeing his procreation carried full term is perhaps, at least equal to that of the mother. It may be that the husband's interest in this mutual procreation attaches at the moment of conception."

A woman does not have an absolute right to bodily privacy. The Courts have consistently recognized that personal bodily privacy is not inviolable. In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court determined that a state had the power to sterilize a mentally defective person. Compulsory vaccination laws were upheld by the Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The power of a state to take a blood sample from an unconsenting alleged drunk driver was sustained in *Schmerber v. California*, 384 U.S. 757 (1966). In *Raleigh Fitken-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537 (1964), *cert. denied* 377 U.S. 985 (1964), the Court ordered blood transfusion to be given to an unconsenting woman to save the life of the woman and or her unborn child. More recently the Supreme Court in *Roe*, 410 at 154, noted that the privacy right involved in a woman's decision to abort her unborn child "cannot be said to be absolute."

When one is a member of society he does not have an absolute right to do what he wants. The interests of others must necessarily be considered. "When one becomes a member of society he necessarily parts with some privileges . . . one who is prevented from injuring another cannot justly assert that he himself has been deprived of any right." 16 Am. Jur. 2d, Constitutional Law, § 60, 687. Also see G. Lipson & D. Wolman, "Polling Americans on Birth Control and Population," 4 *Family Planning, Perspectives* 39 (1972).

Since it is established that the husband has an interest in his unborn child and that a woman does not have an absolute right to bodily privacy, it follows that the husband shares a right of privacy in the abortion decision with his wife. There are marital, as well as purely personal privacy rights, that are involved here. The Court recognized the existence of marital privacy, the privacy of the marital relationship, in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Mr. Justice Douglas, speaking for the majority, did not refer to individual separate rights of the husband and wife. Instead, he spoke in terms of marital privacy. "A relationship lying within the zone of privacy created by several fundamental constitutional guarantees," *Griswold*, supra at 485.

Since both parents have personal privacy rights as well as shared marital privacy rights, the due process and equal protection clauses appear to compel the weighing of these rights in the abortion decision. It would be an unjust balancing if the privacy interests of the wife were deemed to outweigh the husband's interest in the unborn child and the interests of the marital relationship. In *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court held that a state probate code which gives preference to men over women in the appointment of administrators is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. In a more recent case, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court held that a mandatory maternity leave of five months for pregnant teachers violates the due process clause of the Fourteenth Amendment. *Reed* and *LaFleur* demonstrate that there cannot be discrimination solely based on sex. This would appear to be the result if the husband is precluded from participating in the abortion decision with his wife.

There is a strong similarity in a father's deprivation of his offspring by abortion and a father's deprivation of custody of his children by adoption. In *Stanley v. Illinois*, 405 U.S. 645

(1972), the Supreme Court held that there is a violation of the Due Process Clause of the Fourteenth Amendment when a putative father is deprived of custody of his illegitimate children without a hearing to determine his lack of fitness as a father. In an earlier case, *Armstrong v. Mango*, 380 U.S. 545 (1965), the Court declared that a legitimate parent had to be given notice of a pending adoption of his child by his former spouse's new mate. Therefore, *Stanley* and *Armstrong* indicate that an expectant father is at least entitled to a hearing at which his interests in seeing the pregnancy carried to full term can be weighed against those of the spouse who desires an abortion. The mandatory spousal consent provision of the Missouri law should be upheld for it guarantees that there will be notice to one spouse of the other spouse's desire for an abortion. If there is a disagreement, then the spouses can seek judicial relief. At the judicial proceeding, both parties should be given an opportunity to demonstrate their interest in the outcome of the decision. This decision would not be an impossible one for the Court. Standards for the decision making have been suggested in "The Father's Right in the Abortion Decision," *6 Texas Tech. L. Rev.* 1075, 1093 (1975). It should be noted that the consent of both spouses is required by statute for many major family decisions. One example is the spousal consent requirement concerning the legitimization of children conceived by artificial insemination. See Georgia Code § 74-101.1; Kansas Statutes § 23-128; North Carolina Gen. Stats. § 49A-1.

It is essential to realize that the father has a major role and interest in the birth of his child. Fatherhood provides an opportunity for the man to expand his horizons and develop his human potentials, including generative and generosity. E. Erikson, "Identity and the Life Cycle: Selected Papers," 1 *Psychological Issues* 1 (1959). The psychological importance of fatherhood was evidenced by the many letters written by soldiers during WW II which revealed fantasizing about their children, and that such fantasies helped them to overcome hardships and

deprivations. It actually increased their resourcefulness in actual danger. T. Benedek, "Fatherhood and Providing" in *Parenthood* at 167.

Today, fathers express increasing interest in the progression of their wife's pregnancy. Many feel increasing anticipation and anxiety as the date of birth approaches. See, generally, Spock, *Baby and Child Care*, 28-31 (1969); L. Jessner, E. Weigert & J. Loy, "The Development of Parental Attitudes During Pregnancy," in *Parenthood* at 209. Married couples are increasingly participating in the Lamaze method of prepared childbirth. According to this and other similar programs, the couple works as a team in preparing the wife for childbirth. The husband assists the wife with breathing exercises and emotional support during pregnancy and during childbirth itself. The major emphasis now is on the father as a complementary partner and co-partner throughout the entire parenting process. O. English and C. Foster, *Fathers Are Parents, Too* (1951) and G. Schaefer, "The Expectant Father: His Care and Management," 38 *Postgraduate Medicine* 658 (1965). Therefore, the husband's interest in the birth of his child would be completely terminated if his spouse would have an abortion without his consent. Surely such an action by the wife would also severely damage the integrity of the marriage relationship. Where the state allows the woman to seek an abortion without her husband's consent, it prefers the wife's right of bodily privacy over the privacy of the marital relationship and the husband's right of bodily privacy. See *Reed, Cleveland Board of Education, Stanley*, and *Armstrong*.

Survival of the family in society today is based in great part on the mutuality of decision making by the partners of a marital relationship. A state, by eliminating the requirement of spousal consent in the abortion decision process, would be interfering with the stability of the family unit.

Assuming *arguendo*, that a woman carries her unwanted pregnancy to term, there is firm authority to support the position that she may grow to love the child. An unwanted pregnancy and resulting birth does not mean that the woman will beat or batter her child. B. Steele, "Parental Abuse of Infants and Small Children," in *Parenthood* at 449. R. Helfer and C. Kemper, *The Battered Child* (1968).

Even if she bears the child and does not eventually love her child, it cannot be denied that the father could provide proper care for the child. In situations where there are divorces and the father retains child custody, it is not unusual for the father to adequately raise the child in a healthy emotional environment. Widowers can and do raise emotionally healthy children. Therefore, the wife's interest alone should not be absolute in any determination of the abortion decision.

As such, it is logical to assume that a competent party, i.e., the father, should be allowed to guard the interest of the unborn child through the final stages of pregnancy and throughout the infant's childhood. It should also be noted that the state also has an interest in protecting the unborn. See, generally, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537 (N.J. 1964), *cert. denied* 377 U.S. 985 (1964). Even in *Roe*, at 163, the Supreme Court noted that the state has an interest in protecting pre-natal life, although it limited this interest until the unborn child has reached viability. Thus, the father's interest in his unborn child and the state's interest in the protection of the unborn clearly outweigh the interest of the wife who wants to abort her pregnancy without the consent of her spouse.

CONCLUSION

To sustain the appellants' position in this case would isolate the 18 year old and under unmarried girl from her family at the very moment she is to make a crucial decision re-

garding her unborn child. Appellants would insist this girl consult an abortion clinic (wherein the livelihood of the abortionist, or the counselor, or the other supporting personnel may well depend upon abortions) to help her make that decision. The comfort of her parents or of a trusted person in *loco parentis* would be yanked away from her at a time she so desperately needs the help such a confidant could give. Appellants would place her in a social vacuum to be aided only by the abortionist who not only has a financial stake in the outcome, but is ideologically predisposed to advising her of a course to abort.

Section 3(3) of House Bill 1211 would be declared unconstitutional by the appellants and throw the woman's spouse completely out of the household. He can be required to support the child, to educate his child, he must expressly disinherit his child, but he has no rights to the very existence of his child. The appellants insist the wife has an absolute right to destroy her unborn child and the husband has no rights. All the mother is willing to give her spouse is the duties, and none of the rights. It is clear from the documents submitted by the Social Workers for Life that this burden is one which may well destroy the well being of the father, as well as the family relationship.

Therefore, we feel that both the parental consent and spousal consent is absolutely essential to the well being of the society in which we have placed the family relationship.

Respectfully submitted

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